Lisi ak Rasek v Malcom Migain

HIGH COURT (KUCHING) — CIVIL APPEAL NO KCH-12B-31/10 OF 2012
RHODZARIAH BUJANG J
7 MARCH 2013

Civil Procedure — Pleadings — Material facts — Road accident — Defendant pleaded accident caused by plaintiff colliding into her while he was overtaking — Whether failure to plead what it was that plaintiff was overtaking fatal — Whether defendant's later testimony that plaintiff was overtaking bus should be expunged because of failure to mention 'bus' in pleadings — Whether plaintiff at pre-trial discovery stage knew of defendant's stand on cause of accident

The sessions court had found the appellant car driver wholly liable in a road accident negligence claim brought against her by the respondent motorcyclist. The respondent claimed the collision occurred when the appellant crossed his path to turn into a junction. The appellant, on the other hand, contended that she was stationary at the junction and that the respondent hit her car when he was attempting to overtake a bus. In her statement of defence, the appellant had only pleaded that the respondent collided into her while he was in the process of overtaking. She did not state what it was that he was overtaking. The presence of a bus was not pleaded. Because of that failure, the trial judge expunged that part of the appellant's evidence alleging the collision occurred when the respondent was attempting to overtake a bus. The respondent suffered a closed fracture of the right tibia, laceration wound to his knee and muscle wasting as a result of the accident. The trial court awarded him a global sum of RM59,500 in respect of the injuries. The appellant appealed to the High Court against both liability and quantum.

Held, allowing the appeal against liability but affirming the quantum awarded:

(1) The trial judge was wrong to have expunged the appellant's evidence relating to the bus. The material fact of overtaking by the respondent, as allegedly being the cause of the collision, was pleaded. The omission to say that it was a bus that was being overtaken should therefore not be fatal, for when he was served with the statement of defence the respondent could have applied for further and better particulars of what that vehicle was (see paras 4 & 5).

(2) The respondent had been alerted of the alleged cause of the collision by the appellant and the omission to specify the vehicle in the statement of defence was not fatal. It was also not fatal because the respondent at the

pre-trial discovery stage must have known of the appellant's police report where this fact was mentioned (see para 6).

(3) In the absence of independent evidence on the damage to the vehicles and a sketch plan from the investigating officer, there was inherent probability in each of the versions given for the accident. The accident could have happened the way both the appellant and the respondent said it did, and given that equality, the respondent obviously had failed to prove his case on a balance of probability (see paras 7 & 8).

(4) The quantum awarded by the trial judge was reasonable and his assessment of it should not be interfered with (see para 10).

[Bahasa Malaysia summary

Mahkamah sesyen telah mendapati perayu, pemandu motokar bertanggungjawab secara menyeluruh di dalam tuntutan kecuaian kemalangan jalan raya yang dibuat terhadapnya oleh responden, penunggang motosikal. Responden mendakwa bahawa pelanggaran berlaku apabila perayu melintas laluannya untuk membelok masuk ke simpang. Perayu, sebaliknya, berhujah bahawa dia tidak bergerak di simpang tersebut dan bahawa responden telah melanggar keretanya apabila dia cuba memintas sebuah bas. Di dalam penyataan pembelaannya, perayu hanya memplid bahawa responden telah berlanggar dengannya semasa dia di dalam proses untuk memintas. Dia tidak menyatakan apa yang cuba dipintas. Kewujudan sebuah bas tidak diplid. Disebabkan kegagalan tersebut, hakim bicara telah melucut bahagian tersebut daripada keterangan perayu yang mendakwa pelanggaran berlaku apabila responden cuba memintas sebuah bas. Responden mengalami closed fraktur pada tulang tibia kanannya, luka melecet pada lutut dan penyusutan otot disebabkan oleh kemalangan tersebut. Mahkamah bicara mengawardkannya jumlah global sebanyak RM59,500 berkaitan dengan kecederaan-kecederaan tersebut. Perayu membuat rayuan kepada Mahkamah Tinggi terhadap kedua-dua liabiliti dan kuantum.

Diputuskan, membenarkan rayuan terhadap liabiliti tetapi mengesahkan kuantum yang diawardkan:

(1) Hakim bicara telah terkhilaf dengan melucutkan keterangan perayu berkenaan dengan bas tersebut. Fakta material tentang pemintasan oleh responden, seperti yang didakwa, yang mana menyebabkan pelanggaran, telah diplid. Kegagalan untuk menyebut bahawa ia adalah sebuah bas yang telah dipintas oleh itu tidak memudaratkan, oleh kerana apabila dia disampaikan dengan penyataan pembelaan responden boleh memohon untuk butiran selanjutnya dan yang lebih baik tentang kendaraan apakah yang dimaksudkan (lihat perenggan 4 & 5).

(2) Responden telah dimaklumkan tentang sebab pelanggaran yang didakwa oleh perayu dan kegagalan untuk menyatakan jenis kenderaan di dalam

penyataan pembelaan adalah tidak memudaratkan. Ia juga tidak memudaratkan kerana responden pada peringkat penzahiran pra-perbicaraan semestinya telah tahu tentang laporan polis di mana fakta tersebut telah dinyatakan (lihat perenggan 6).

(3) Dalam ketiadaan keterangan bebas tentang kerosakan pada kenderaan dan pelan berlukis daripada pegawai siasatan, terdapat kemungkinan tersirat di dalam setiap versi yang diberikan untuk kemalangan tersebut. Kemalangan tersebut mungkin terjadi seperti mana yang dikatakan telah terjadi oleh kedua-dua perayu dan responden, dan melihatkan kepada kesamarataan tersebut, responden dengan jelas telah gagal untuk membuktikan kesnya atas dasar imbangan kebarangkalian (lihat perenggan 7 & 8).

(4) Kuantum yang diawardkan oleh hakim bicara adalah berpatutan dan penelitian oleh beliau mengenainya tidak harus dicampur tangan (lihat perenggan 10).]

Notes

For cases on material facts, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 6504–6506.

Cases referred to

Rosita bte Baharom (an infant) v Sabedin bin Salleh [1993] 1 MLJ 393, SC (refd)

Legislation referred to

Road Traffic Rules 1959 r 10

Sunny Si (Sii & Associates) for the appellant.
Sarbjit Singh Khaira (Joseph Kahell Baleng with him) (Khaira & Co) for the defendant.

Rhodzariah Bujang J:

[1] In the sessions court a judgment on 100% liability was entered against the defendant (car driver) in this claim for negligence brought against her by the plaintiff (motorcyclist), who was under age (16 years) and without a riding licence at that material time.

[2] The accident apparently occurred at the front of a junction. The motorcyclist claimed that he was collided into when the car driver crossed his path to turn into the junction. The car driver said her car was stationery at the front of the junction and a school bus was exiting the junction when the motorcyclist suddenly hit her car when it tried to overtake the bus.

[3] The presence of the bus was not pleaded in the statement of defence. The car driver only pleaded as follows in para 2.2 of her defence:

> At the material time the said motorcyclist coming from the opposite direction suddenly and without warning whatsoever, encroached into the path of travel of the said car AND/OR in the process of overtaking, swerved into the said car.

[4] The learned sessions court judge has expunged the evidence of the car driver on the allegation that the collision occurred when the motorcyclist attempted to overtake the bus because he reasoned that it was not pleaded. Mr Sunny Si for the car driver has cited a number of cases in support of his proposition that his client should not be precluded from adducing that evidence because the material fact of overtaking has been pleaded in the statement of defence and therefore the motorcyclist was not misled or prejudiced or in any way taken by surprise by the evidence of the bus being the vehicle which the motorcyclist was trying to overtake as testified by his client at the trial. Since the Supreme Court had distilled the principle on overcoming defects in pleading from a long line of cases, two of which where also cited by Mr Sunny Sii, I would be forgiven for referring to just that decision of the apex court: *Rosita bte Baharom (an infant) v Sabedin bin Salleh* [1993] 1 MLJ 393 where LC Vohrah J held, for the Supreme Court, that in appropriate circumstances, evidence given at the trial can overcome defects in the pleadings of the plaintiff as long as the defendant from the very outset has not been misled, prejudiced, embarrassed or in any way taken by surprise, or led astray by the plaintiff's pleadings.

[5] Now, as I said earlier, in this case the material fact of overtaking by the plaintiff which was alleged to cause the collision was pleaded. The omission to say it was a bus that was being overtook should therefore not be fatal for when served with the statement of defence, the motorcyclist was at full liberty to apply for further and better particulars of what that vehicle was.

[6] In other words, he had been alerted of the alleged cause of the collision by the car driver and the omission to specify the vehicle in the statement of defence is not fatal. It is also not fatal because the plaintiff at the pre-trial discovery stage must have known of the car-driver's police report where this fact was also mentioned. I would therefore, with respect, rule that the expunging of this evidence by the learned sessions court judge was wrong.

[7] What impact that ruling has on the issue of liability would have to be examined in the light of the following evidence:

(a) the investigating officer tasked to conduct the investigation in this case (DW2) did not draw any sketch plan nor did he take note of the damage sustained by the car although he saw it at the workshop. The sketch plan

tendered at the trial was drawn by the motorcyclist. But despite that, the investigating officer concluded that the motorcyclist was at fault and he was charged with an offence under r 10 of the LN166/59 for neglect to exercise due control over the movements of the vehicle. He paid the compound. He was also issued a summons for riding the motorcycle without its owner's permission, as well as for riding it without being covered by a third party risk insurance and also not for reporting the accident within 24 hours; and

(b) the motorcyclist only reported the accident eight days after the accident which the learned sessions court judge find excusable because he was hospitalised for the fracture to the mid-shaft of his right leg. The car driver was similarly issued with a summons for failure to report the accident within 24 hours. She only lodged hers ten days after the accident and that too, after being called up by the police. Her excuse was that the motorcyclist sister has agreed to pay for the damage to her car and that they have agreed to settle the matter without involving the police. She was also issued a summons for failure to stop during the accident and she paid the compound for both summons. Now, in her witness statement she claimed to have stopped to check on the motorcyclist and took him home but not to the hospital, at his own insistence. She said she paid the compound just to avoid the inconvenience and admitted that she lodged the police report after the motorcyclist father came to see her about it.

[8] When I examined the above evidence in the light of the error in expunging the car driver's evidence pertaining to the bus and particularly given the negative imputations of the conduct of both parties in relation to the summonses issued against them, it is safe to say, in the absence of independent evidence on the damage to the vehicles and a sketch plan from the investigating officer, that there was inherent probability in each of the versions given for the accident. In other words, the accident could have also happened as both the motorcyclist and the car driver said it did and given that equality, the motorcyclist obviously has failed to prove his case on a balance of probability.

[9] As for the quantum, the motorcyclist suffered, as I said earlier a close fractured of the right tibia as well as laceration wound to his right knee. He, however, had to undergo the following operations:

(a) insertion of interlocking nail to correct the fracture;

(b) removal of the interlocking nail;

(c) right tibial bone resection, bone transport and lengthening using iliazarov fixation; and

(d) bone grafting of the right tibial docking site.

[10] There was also muscle wasting as testified by the doctor, PW3. These operations of course would leave scars on his leg and the global sum of RM59,500 awarded by the learned sessions court judge for pain and suffering after deducting 15% from the individual awards he gave is to me reasonable and his assessment of it should not be interfered with.

[11] In conclusion, the appeal on liability is allowed but not that on quantum. I order that cost of this appeal be borne by the parties themselves.

Appeal against liability allowed but affirming quantum awarded.

Reported by Ashok Kumar